

DOCKET FILE COPY ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

DEC 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)
)
Advanced Television Systems and)
Their Impact Upon the Existing)
Television Broadcast Service)

MM Docket No. 87- 268'

Directed to: The Commission

COMMENTS ON MSTV ALTERNATE CHANNEL ALLOTMENT PLAN

The Pikes Peak Broadcasting Company ("Pikes Peak"), licensee of Station KRDO-TV, Colorado Springs, Colorado, respectfully submits the following Comments in connection with the further consideration of the digital television allocations. With respect thereto, the following is presented:

The November 20, 1997 submission by the Association for Maximum Service Television, Inc. ("AMST"), noted a number of allocation matters. These comments are directed to the DTV allocation of Station KTSC, Pueblo, Colorado, which presently operates on Channel 8, and has been allocated DTV Channel 29. KTSC is owned and operated by the University of Southern Colorado ("University") located in Pueblo, Colorado. On January 22, 1990, University proposed to relocate the transmitter site of its KTSC Channel 8 from its present location on Baculite Mesa to Cheyenne Mountain (BPET 900122KE). That proposal was short spaced with Station KJCT, Grand Junction, Colorado, also owned by The Pikes Peak Broadcasting Company. It was also short spaced with the Commission's allocation for an educational station at Laramie, Wyoming. Pikes Peak did not object to the short spaced proposal because it was

No. of Copies rec'd
List ABCDE

004

advanced by University for the purpose of helping it better serve Southern Colorado, including areas of Colorado Springs which it was not able to achieve from its licensed transmitter site on Baculite Mesa. On February 28, 1991, the FCC granted University a CP for the move. Subsequently, however, and apparently at the behest of Sangre De Cristo Broadcasting Co., Inc. ("Cristo"), licensee of commercial Station KOAA(TV), Pueblo, Colorado, an exchange of channels was proposed pursuant to Rule 1.420(h). A Petition for Rulemaking was filed in September 1992 wherein Cristo sought to acquire the University CP for the Cheyenne Mountain site. However, in granting the channel exchange, the Commission left University and Cristo at their presently licensed transmitter site on Baculite Mesa, north latitude 38 degrees, 22 minutes, 25 seconds, west longitude 104 degrees, 33 minutes, 27 seconds. Moreover, University stated in the Petition for Rulemaking that it had totally abandoned its proposal to relocate its transmitter site at Cheyenne Mountain. Nevertheless, in establishing the DTV allocations, the Commission used the coordinates set forth by University in its now abandoned construction permit for Cheyenne Mountain. The proposed allocation of DTV, Channel 29, based on the Cheyenne Mountain coordinates is improper and erroneous and must be corrected to specify a DTV channel and site for University on Baculite Mesa.¹ The Commission's error was repeated by AMST in its November 20, 1997 filing with the Commission.

¹The Commission has originally proposed to assign DTV Channel 22 for use by KTSC. Pikes Peak objected to that allocation in its comments filed November 25, 1996 pointing out that KTSC was remaining at its licensed site and that the proposed allocation of Channel 22 would violate the 20-55 mile Zone of Prohibition.

This might ordinarily appear to be of little consequence, but what is involved here concerns the efforts of Cristo to relocate its KOAA transmitter site to Cheyenne Mountain so as to serve Colorado Springs with lesser emphasis on Pueblo, its city of license. The approval of the exchange of channels by the Commission was for the licensed transmitter site of KOAA and KTSC on Baculite Mesa at north latitude 38 degrees, 22 minutes, 25 seconds, west longitude 104 degrees, 33 minutes, 27 seconds. Thus, the Commission has necessarily changed the coordinates of KSTC for DTV allocation purposes back to Baculite Mesa and the continued use of the coordinates for Cheyenne Mountain is in error and must be corrected to specify coordinates at Baculite Mesa.²

By exchanging channels and with the University DTV Channel 29 carry transmitter site coordinates for Cheyenne Mountain, Cristo will be able to achieve a move to Cheyenne Mountain without Commission approval, something that the Commission has steadfastly refused to do. Thus, it is extremely important that the Commission properly identify the location of the University DTV allocation as Baculite Mesa and not Cheyenne Mountain. Specifically, the Commission should specify that the DTV allocation to University is not to be at Cheyenne Mountain, but rather at the presently licensed site north latitude 38 degrees, 22 minutes, 25 seconds, west longitude 104 degrees, 33 minutes, 27 seconds at Baculite Mesa.

²The Commission decision in the matter of the channel exchange in which it specified that the exchange use the existing Baculite Mesa transmitter site of both KOAA and KTSC are attached hereto (Exhibit 1).

The DTV allocation of Channel 29 to University will not work at the coordinates of the presently licensed site. However, Channel 46 will. This is confirmed by the attached statement (Exhibit 2).

Wherefore, the premises considered, it is respectfully requested that the Commission specify that the DTV allocation for KTSC licensed to the University of Southern Colorado and operating on Channel 46 have as its geographical coordinates north latitude 38 degrees, 22 minutes, 25 seconds, west longitude 107 degrees, 51 minutes, 12 seconds.

Respectfully submitted,

THE PIKES PEAK BROADCASTING COMPANY

By: 

Richard Hildreth

Its Attorney

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street
11th Floor
Arlington, Virginia 22209
(703) 812-0400

December 17, 1997

rh22/pikepeak.dtv

EXHIBIT 1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-191

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
TV Broadcast Stations.
(Pueblo, Colorado)

RM-8088

NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 1993;

Released: July 13, 1993

Comment Date: September 3, 1993

Reply Comment Date: September 20, 1993

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed jointly by the University of Southern Colorado ("USC"), licensee of noncommercial television Station KTSC(TV),¹ Channel *8, Pueblo, Colorado, and Sangre de Cristo Communications, Inc. ("SCC"), licensee of commercial television Station KOAA-TV, Channel 5, Pueblo,² to exchange their channels, pursuant to the provisions of Section 1.420(h) of the Commission's Rules.

2. Section 1.420(h) allows a noncommercial educational television and a commercial television licensee or permittee to jointly petition for rule making to amend the Television Table of Allotments to exchange channels. The channel to be obtained by the noncommercial educational licensee or permittee would be reserved for noncommercial educational use and the channel acquired by the commercial licensee would be dereserved. Proposals must involve intraband channel changes, the stations involved must serve "substantially the same market, and the proposal must serve the public interest." See *Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988). Parties must offer assurances that any consideration resulting from the exchange will be devoted exclusively to activities related to the operation of the noncommercial educational television station.

3. SCC advises that it will provide financial support to USC, and will donate its translator Station K30AA, Colorado Springs, Colorado, as well as the existing licensed facilities of Station KOAA-TV to USC, if the requested exchange of Channel *8 and Channel 5 is approved. With

respect to the public interest benefits of this proposal, petitioners state that the channel exchange would enable USC to improve the quality of Station KTSC(TV)'s signal, increase the coverage of its existing translator network by operating translators at Grand Junction and Durango, Colorado, and offer additional noncommercial programming. Petitioners state that the planned expansion of USC's translator network will enable Station KTSC(TV) to provide a first noncommercial educational television reception service to approximately 83,000 new viewers in western Colorado, and a new reception service to 299,897 persons within either the proposed Grade B service contours of Station KTSC(TV) or within the service area of new translators to be constructed from a portion of SCC's monetary consideration to USC. As to the benefits to accrue to SCC, petitioners advise that although SCC has diligently strived to improve the facilities of Station KOAA-TV in order to provide an enhanced service to Pueblo and the surrounding area, it has been unable to attain its goal. Specifically, SCC advises that it has been precluded from relocating Station KOAA-TV to an antenna farm used by other commercial stations in the joint Colorado Springs-Pueblo market because of the restrictions of the minimum distance separation requirements of Section 73.610(b) of the Commission's Rules. Approval of the requested channel exchange would enable SCC to achieve its goal of expanded service to the entire market, while simultaneously providing substantial benefits to USC.

4. *Background.* USC is licensed to operate Station KTSC(TV) from a site on Baculite Mesa, at coordinates 38-22-25 and 104-33-27. USC previously used a television translator on Channel 53 to provide service to Colorado Springs, which lies partly within its predicted principal community contour but which does not receive adequate service from Station KTSC(TV) due to intervening terrain barriers. In August 1990, USC was required to cease operation on Channel 53 when a full power station commenced operation on that channel. Since USC offers various educational and outreach services in Colorado Springs, it attempted to locate a new channel at the Baculite Mesa site for its translator service to continue serving that community, but was unsuccessful in its efforts at that time.³

5. In order to enable USC to continue providing public television reception service to the Colorado Springs area, USC filed a modification application (File No. BPET-900122KE) to change its site. On February 28, 1991, the Commission granted Station KTSC(TV)'s modification application, with conditions. The permit included a waiver of Section 73.610(b) of the Commission's Rules to permit use of a site for Station KTSC(TV) at an antenna farm on Cheyenne Mountain at coordinates 38-44-44 and 104-51-39. That site is 296.1 kilometers (184 miles) from co-channel Station KJCT(TV), Grand Junction, Colorado, at coordinates 39-02-55 and 108-15-06, and 291.9 kilometers (181.3 miles) from vacant co-channel 8 at Laramie, Wyoming, at reference coordinates 41-18-47 and 105-35-26. Pursuant to the requirements of Section 73.610(b) of the Commission's

¹ On February 28, 1991, USC was granted a construction permit (File No. BPET-900122KE) to operate Station KTSC(TV) from a transmitter site on Cheyenne Mountain, as indicated in paragraph 5, *infra*. Although the construction permit expired on February 28, 1993, an application for an extension of time to complete the modification of Station KTSC(TV)'s facilities has

been filed (File No. BMPET-930216KE).

² USC and SCC will be referred to collectively in this proceeding as "petitioners."

³ USC currently operates translator Station K15BX under special temporary authority (STA) to provide service to Colorado Springs.

Rules, a minimum distance separation of 304.9 kilometers (189.5 miles) is required between co-channel stations in Zone II. Station KTSC(TV) stated that intervening terrain factors, combined with its willingness to reduce its effective radiated power to the north and west of Pueblo, would reduce the possibility of interference to the Grand Junction, Colorado, station or to a future station on Channel 8 in Laramie, Wyoming.

6. *Discussion.* Initially, we note that petitioners' proposal appears to comply with the criteria established in *Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986). Both stations are within the same band and serve the same community of license. Furthermore, USC states that it intends to use the proceeds from the exchange of its Channel *8 with SCC's operation of Station KOAA-TV on Channel 5 solely for improvements related to the operation of Station KTSC(TV). Each station could benefit by potentially improving the quality of their facilities, thus providing a public benefit by rendering either new or improved commercial and noncommercial service. Finally, Pueblo would retain both commercial and noncommercial stations after the exchanges, if the proposal is adopted.

7. We have several areas of concern on which we request comment. The first concern is related to SCC's preferred site for Station KOAA-TV on Channel 8. Although SCC proposes to use USC's presently authorized construction permit site for Station KOAA-TV at coordinates 38-44-44 and 104-51-39, as indicated above, we note that USC has not operated Station KTSC(TV) from the site proposed in its construction permit. Since no facilities have been operated at this site, we believe it appropriate to propose to modify SCC's authorization for Station KOAA-TV to specify the site in USC's outstanding license for Station KTSC(TV), and not its construction permit site.⁴ SCC can operate Station KOAA-TV on Channel 8 at the presently licensed site of Station KTSC(TV), which is also the licensed location of Station KOAA-TV's present operation on Baculite Mesa, at coordinates 38-22-25 and 104-33-27, in conformity with the minimum distance separation requirements of the Commission's Rules, rather than the site

specified in the construction permit issued to USC at coordinates 38-44-44 and 104-51-39.⁵ Therefore, we will propose the channel exchange and dereservation of Channel *8 and the reservation of Channel 5 at coordinates 38-22-25 and 104-33-27 to accommodate the petitioners' proposal.

8. Our second area of concern is related to USC's proposed noncommercial operation on Channel *5 at Pueblo at the presently licensed site of Station KOAA-TV. As previously noted, approximately two years ago, USC was granted a waiver of Sections 73.610 and 73.685 based upon its stated need to continue providing noncommercial educational television service to Colorado Springs without relying on a translator to provide a viewable signal to that community. With respect to the instant proposal, we note that according to petitioners' engineering exhibit, shadowing occurs in Colorado Springs from the KOAA-TV/KTSC(TV) licensed site which requires a translator to provide service to that portion of their service area. Therefore, while we expect USC to continue its commitment to serve Colorado Springs, in light of its current proposal, we do not believe it is generally desirable to replace primary service to that community, as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation, and we invite comments in this regard. In the event USC plans to discontinue its service to Colorado Springs, we would question the public interest benefits of the proposal.

9. Our third area of concern is related to the potential gain in noncommercial reception service presented by USC's proposal. According to petitioners, the channel exchange will enable USC to provide new noncommercial reception service to 299,897 persons residing within either the proposed Grade B contour of Station KTSC-TV if permitted to operate on Channel *5, or within the service area of the new translators USC proposes to construct at Grand Junction and Durango with the funds derived from the channel exchange.⁶ Further, petitioners' engineering studies reflect that USC's Station KTSC(TV) currently pro-

⁴ In this regard, although USC has filed an application for an extension of time within which to construct the unbuilt facilities of Station KTSC(TV) on Cheyenne Mountain, we note that pursuant to the terms of Section 73.3535(b) of the Commission's Rules, grant of such an extension request requires a showing that either construction is complete and testing is underway; or that substantial progress has been made in the construction of the station; or that reasons clearly beyond the permittee's control prevented construction and that all possible steps have, nevertheless, been taken to resolve the problem and to proceed with construction.

While USC's involvement in this rule making may provide a sufficient basis to warrant an extension of its construction deadline, it does not absolve it from its commitment to complete the construction of Station KTSC(TV)'s modified facilities. Permittees are expected to abide by the Commission's Rules regarding time constraints and limitations governing extension requests in order to avoid unwarranted delays in service to the public. In the absence of a showing that the instant proposal could adversely affect USC's commitment to construct the modified facilities for Station KTSC(TV), its decision to defer construction must be viewed as a business judgment and not a situation beyond its control. See, e.g., *New Dawn Broadcasting*, 63 RR 2d 1198 (1987).

⁵ As indicated in paragraph 5, *supra*, the allotment of Channel 8

at USC's construction permit site would be short spaced to Station KJCT(TV), Channel 8, Grand Junction, Colorado, and to vacant Channel 8 at Laramie, Wyoming. Also, as previously stated, although USC was granted a waiver for Station KTSC(TV) on Channel *8 based in part on the need to continue providing public television service to Colorado Springs without relying on a translator to accomplish its goal, we do not believe it appropriate to determine at the rule making stage whether a similar request from a commercial licensee would be granted at the application stage.

⁶ Petitioners advise that improvements in USC's translator network would result in an increase in Station KSTC(TV)'s viewers in Grand Junction and Durango, Colorado, as well as communities located in the following counties:

| | Population (1990 U.S. Census) |
|------------|-------------------------------|
| Mesa | 93,145 |
| Delta | 20,980 |
| Montrose | 24,423 |
| Ouray | 2,295 |
| San Miguel | 3,653 |
| Dolores | 1,504 |
| San Juan | 745 |
| La Plata | 32,284 |

vides service to 598,614 persons from its licensed site, whereas SCC's Station KOAA-TV currently serves 604,012 persons from the same location. Thus, USC would gain service to 5,398 persons by moving Station KTSC(TV) to Channel *5. According to petitioners, the proposed population gain to USC's operation of Station KTSC(TV) on Channel *5 is attributable to the transmission equipment that USC will receive from SCC's Station KOAA-TV as a condition of the channel exchange. Additionally, petitioners' engineering exhibit states that SCC's translator Station K30AA, Colorado Springs, which will be donated to USC in the channel exchange, currently provides service to 340,260 persons within its Grade A contour. This represents an additional potential gain of 211,633 persons over USC's STA operation of its translator Station K15BX, Colorado Springs. Furthermore, petitioners advise that USC's planned expansion of its existing network of 11 translators throughout Colorado by adding translators at Grand Junction and Durango will enable USC to provide a first educational service to an additional 82,871 persons in and around those communities. The majority of USC's service gain showings are related to its proposed translator expansion. However, since Commission policy is to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be protected against the initiation of a full service facility.⁷ Thus, the projected population gains attributed to USC's proposed operation of translators at Grand Junction, Durango and Colorado Springs may be too speculative to be considered in the context of this rule making proceeding. Therefore, we may not consider these gains in conjunction with the overall benefits associated with this proposal. Petitioners are requested to state whether they would be willing to accept adoption of this proposal conditioned on the commencement of translator service as proposed by USC.

10. In view of the above, we will propose to modify the license of Station KTSC(TV), Channel *8, Pueblo, Colorado, to specify operation on Channel *5 and to modify the license of Station KOAA-TV, Channel 5, Pueblo, to specify operation on Channel 8, pursuant to the provisions of Section 1.420(h) of the Commission's Rules. As indicated above, if this proposal is granted, Station KTSC(TV) may operate on Channel *5 at the existing licensed site of Station KOAA-TV.⁸

11. This proposal is not affected by the Commission's current freeze on television petitions for rule making or construction permit applications for vacant allotments since this proposal involves an exchange of allotments, with no change in the overall number of allotments in the community and no new allotment will become available for application. See *Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, July 29, 1989.

12. We believe the public interest would be served by proposing the allotment of Channel *5 to Pueblo as a substitute noncommercial educational channel for Channel

*8, as well as the allotment of Channel 8 to Pueblo as a substitute commercial channel for Channel 5. Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules with respect to Pueblo, Colorado, as follows:

| City | Channel No. | |
|------------------|-----------------|-----------------|
| | Present | Proposed |
| Pueblo, Colorado | 5, *8, 26+, 32- | *5, 8, 26+, 32- |

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before **September 3, 1993**, and reply comments on or before **September 20, 1993**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners' counsel, as follows:

Wayne Coy, Jr., Esq.
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(Counsel for University of Southern Colorado)

Kevin F. Reed, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037
(Counsel for Sangre de Cristo Communications, Inc.)

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.606(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is

| | |
|-----------|---------|
| Montezuma | 18,672 |
| Gunnison | 10,273 |
| Total | 207,974 |

⁷ Section 74.702(b) of the Commission's Rules provides that changes in the existing Television Table of Allotments may be made without regard to existing television translator stations and that, where such changes result in initiation of service

which results in interference to reception of the signal of a full service station, the licensee of the interfering translator station must eliminate the interference or file applications for changes in their frequency.

⁸ As stated previously, Station KTSC(TV) and Station KOAA-TV are both licensed to operate from an electronics site on Baculite Mesa at coordinates 38-22-25 and 104-33-27.

no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-191

In the Matter of

Amendment of Section 73.606(b), RM-8088
Table of Allotments,
TV Broadcast Stations.
(Pueblo, Colorado)

REPORT AND ORDER

Adopted: June 30, 1995;

Released: July 14, 1995

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making* ("Notice")¹ issued in response to a petition filed jointly by the University of Southern Colorado ("USC"), licensee of noncommercial television Station KTSC(TV), Channel *8, Pueblo, Colorado, and Sangre De Cristo Communications, Inc. ("SCC"), licensee of commercial television Station KOAA-TV, Channel 5, Pueblo, Colorado (jointly, "petitioners"). The *Notice* proposes an exchange of television channel assignments between Station KTSC(TV) and Station KOAA-TV pursuant to Section 1.420(h) of the Commission's Rules, 47 C.F.R. § 1.420(h). Under this proposal, the Television Table of Allotments, 47 C.F.R. § 73.606(b), would be amended as follows:

| City | Present | Channel No. | Proposed |
|------------------|-----------------|-------------|-----------------|
| Pueblo, Colorado | 5, *8, 26+, 32- | | *5, 8, 26+, 32- |

Thus, under the proposal, Channel 5 would be reserved for noncommercial educational use, and Channel *8 would be reserved.

2. Petitioners filed comments in response to the *Notice*, as did KKTV, Inc. ("KKTV"), licensee of commercial television Station KKTV(TV), Colorado Springs, Colorado, and Pikes Peak Broadcasting Company ("Pikes Peak"), licensee

of commercial television Station KRDO-TV, Colorado Springs, Colorado, and commercial television Station KJCT-TV, Grand Junction, Colorado. Central Wyoming College ("CWC"), an applicant for a new noncommercial television station to operate on Channel *8 at Laramie, Wyoming,² also filed comments *ex parte*.³ Petitioners, KKTV, and Pikes Peak filed reply comments.⁴

3. In addition, prior to the submission of comments in this proceeding, petitioners filed a Joint Motion to Consolidate Proceedings, requesting that a number of their pending application proceedings be consolidated with the instant rule making proceeding. KKTV and Pikes Peak filed oppositions to this motion, and petitioners filed a reply. These pleadings are currently before the Commission.

THE NOTICE

4. We found in the *Notice* that petitioners' proposal appeared to meet the Commission's requirements for channel exchanges between a noncommercial educational television station and a commercial television station,⁵ but we also expressed concern with respect to several matters. First, we observed that USC held a construction permit to modify Station KTSC(TV)'s facilities by relocating its main transmitter from its present site at Baculite Mesa to a site at Cheyenne Mountain, and that SCC wished to operate Station KOAA-TV from the construction permit site rather than from USC's licensed site. However, the Cheyenne Mountain construction permit site is short spaced to Station KJCT(TV), Channel 8, Grand Junction, Colorado, and to vacant Channel 8 at Laramie, Wyoming.⁶ Although USC had been granted a waiver of the minimum distance separation requirements of Section 73.610(b) in order to construct facilities for its noncommercial station at the Cheyenne Mountain site, we stated in the *Notice* that it would not be appropriate to decide at the allotment rule making stage whether such a waiver request by a commercial licensee would be granted.⁷ We therefore did not propose to modify SCC's authorization for Station KOAA-TV to specify the Cheyenne Mountain construction permit site, as SCC desired, but instead proposed to modify Station KOAA-TV's authorization to specify Station KTSC(TV)'s licensed site at Baculite Mesa.⁸

5. Second, USC had previously stated, in connection with its application to modify Station KTSC(TV)'s transmitter site, that it needed to move to the short-spaced site at Cheyenne Mountain in order to provide noncommercial educational television service to Colorado Springs without relying on a translator.⁹ Now, however, petitioners propose

¹ 8 FCC Rcd 4752 (1993).

² File No. BPET-921210KE.

³ CWC's comments did not include a certificate indicating that a copy had been served on petitioners' counsel. Nonetheless, in the interest of assembling a complete record, we have considered these comments.

⁴ Petitioners have also submitted a number of letters from community leaders supporting the proposed channel exchange.

⁵ As we noted, both stations operate within the same band and serve the same community of license. USC has stated that it would use the proceeds from the exchange solely to improve the service of Station KTSC(TV), and a public benefit could be obtained through the exchange. *Notice*, 8 FCC Rcd at 4753. See also 47 C.F.R. § 1.420(h); *Amendments to the Television Table of*

Assignments to Change Noncommercial Educational Reservations, 59 RR 2d 1455 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988) ("*Intraband Television Channel Exchanges*").

⁶ As already noted, CWC has filed an application for a new noncommercial educational station on Channel *8 at Laramie. See *supra* note 2.

⁷ *Notice*, 8 FCC Rcd at 4753 n.5.

⁸ *Id.* at 4753.

⁹ USC at one time used a translator station on Channel 53 to provide service to Colorado Springs, but in 1990 was required to cease operation on that channel due to the initiation of operations by a full power station. USC now operates translator

that USC operate from Station KOAA-TV's licensed site, which is, like the present licensed site of Station KTSC(TV), located at Baculite Mesa. Noting that, according to petitioners' engineering exhibit, shadowing occurs in Colorado Springs from this site, thus necessitating the use of a translator to provide service to that city, we observed in the *Notice*: "[W]e do not believe it is generally desirable to replace primary service to that community, as contemplated in connection with USC's waiver request, with a secondary service which could ultimately be forfeited to a full service television operation. . . ."¹⁰ We further stated that we would question the public interest benefits of the channel exchange proposal if USC planned to discontinue service to Colorado Springs.¹¹

6. Third, most of the potential gain in noncommercial reception service represented in petitioners' proposal would depend on the use of translators. According to petitioners, the proposed channel exchange would enable Station KTSC(TV) to provide new noncommercial reception service to 299,897 persons. However, this number includes 211,633 persons who would receive their first educational service as a result of USC's use of SCC's translator Station K30AA, which SCC would donate to USC as a condition of the channel exchange. In addition, 82,871 persons would receive Station KTSC(TV) as their first over-the-air educational service only through translator stations at Grand Junction and Durango, which, petitioners have stated, USC plans to construct using funds contributed to it by SCC in the channel exchange.¹² Because it is the Commission's policy to treat translators as secondary services for purposes of spectrum priority, USC's projected translator expansion would not be protected from the operation of a full service station. For this reason, we stated in the *Notice* that USC's projected population gains related to its proposed operation of translator stations at Colorado Springs, Grand Junction, and Durango might be too speculative to be considered in the context of this rule making proceeding and that we may not consider such gains as part of the overall benefits of the proposal.¹³

JOINT MOTION TO CONSOLIDATE PROCEEDINGS

7. Before considering the channel exchange proposal at issue here, we must address petitioners' Joint Motion to Consolidate Proceedings. The application proceedings petitioners wish to have consolidated with the instant channel exchange rule making proceeding involve (1) SCC's application for reinstatement of its construction permit for television translator Station K15BX, Colorado Springs;¹⁴ (2) SCC's application for an extension of time to construct Station K15BX;¹⁵ (3) SCC's application for an extension of its STA to rebroadcast Station KTSC(TV) on translator

Station K15BX; (4) USC's application for an extension of time to construct modified facilities at Cheyenne Mountain;¹⁶ (5) petitioners' application to assign the Cheyenne Mountain construction permit to SCC;¹⁷ and (6) four applications for new UHF translator stations filed by USC.¹⁸ According to petitioners, all of the pleadings filed in connection with these applications involve the same facts and issues and are ultimately related to the public interest merits of the proposed channel exchange. For these reasons, they argue, there is no need for the Commission to issue multiple decisions.¹⁹ Petitioners also assert that the pleadings filed by KKTV and Pikes Peak against these applications have been submitted for the purpose of delaying a decision on the merits of the channel exchange, and that justice requires that this delay be avoided through consolidation.²⁰

8. KKTV and Pikes Peak oppose petitioners' motion to consolidate on the grounds that the various application proceedings included in the motion are unrelated or only marginally relevant to the rule making proceeding, and that consolidation would add issues needlessly to the rule making proceeding and delay a decision.²¹ KKTV further states that, if the Commission consolidated the proceedings, it would have to permit interested parties additional time to file comments and reply comments with respect to the additional issues in the consolidated proceeding or deny parties the right to comment on the consolidated proceeding.²² In reply, petitioners point to several facts that they claim demonstrate the connection between the application proceedings and the channel exchange proposal: (1) KKTV and Pikes Peak expressed no opposition to Station KTSC(TV)'s Cheyenne Mountain construction permit or SCC's construction permit for translator Station K15BX until the channel exchange was proposed; (2) KKTV and Pikes Peak devoted substantial portions of their comments in the instant rule making proceeding to discussions of these construction permits; and (3) the *Notice* in this proceeding referenced the pendency of the Cheyenne Mountain construction permit extension request and the Station K15BX STA.²³ Petitioners also assert in their reply that consolidation would not result in delaying the rule making proceeding and would not necessitate the submission of further comments because all issues have already been fully briefed.²⁴

9. We are not persuaded that the consolidation of proceedings requested by petitioners would be appropriate. Petitioners have not demonstrated, as they claim, that the proceedings included in their motion involve the same facts and issues, and we find that the application proceedings they have included are either unrelated to their channel exchange proposal or involve primarily legal issues and/or factual questions that fall outside the scope of this

Station K15BX to serve Colorado Springs. USC's operation of Station K15BX is effected pursuant to special temporary authority ("STA").

¹⁰ *Notice*, 8 FCC Rcd at 4753.

¹¹ *Id.*

¹² See *infra* note 18 and para. 13.

¹³ *Notice*, 8 FCC Rcd at 4754.

¹⁴ File No. BMPTT-911105JE.

¹⁵ File No. BMPTT-921002JE.

¹⁶ File No. BPET-930216KE.

¹⁷ File No. BAPET-930902KE.

¹⁸ These applications are for UHF translator stations at Grand Junction, Colorado (File No. BPTT-930330CC); Cortez-Red

Mesa, Colorado (File No. BPTT-930330CA); Durango, Colorado (File No. BPTT-930330CB); and Ignacio, Colorado (File No. BPTT-930330CD).

¹⁹ Joint Motion to Consolidate Proceedings at 3.

²⁰ *Id.* at 5.

²¹ Opposition of KKTV, Inc. to Joint Motion to Consolidate Proceedings at 2-6; Pikes Peak Opposition to Joint Motion to Consolidate Proceedings at 2-5.

²² Opposition of KKTV, Inc. to Joint Motion to Consolidate Proceedings at 5.

²³ Joint Reply to Oppositions to Joint Motion to Consolidate Proceedings at 3-5.

²⁴ *Id.* at 6.

proceeding. Moreover, contrary to petitioners' assertions, the issues raised by the application proceedings are not germane to our public interest analysis of the instant channel exchange proposal.

10. SCC's applications having to do with translator Station K15BX are unrelated to this proceeding. SCC obtained the construction permit for this station in 1987, well before it sought to exchange channels with USC, in anticipation of the possible displacement of its translator Station K30AA. The fact that USC operates this station pursuant to an STA does not, by itself, mean that SCC's applications to reinstate and extend the construction permit for Station K15BX, and to extend the STA under which it is operated, should be considered in conjunction with this rule making proceeding. SCC has not shown that there is any connection between Station K15BX and the proposed channel swap, or any of its potential public interest benefits, and our mention in the *Notice* of Station K15BX in our description of the current circumstances of Station KTSC(TV)'s operation does not establish such a link.

11. Turning to USC's application for an extension of time to construct at Cheyenne Mountain, we note that USC applied for its construction permit to relocate its main transmitter to a site on Cheyenne Mountain prior to requesting the channel exchange with SCC, stating that it needed to make this modification in order to provide noncommercial educational television service to Colorado Springs without relying on a translator station. In its comments in this proceeding, USC has affirmed that it remains interested in relocating its transmitter to the Cheyenne Mountain site if the channel exchange with SCC is not approved.²⁵ The fact that USC and SCC now wish to include the Cheyenne Mountain construction permit in their proposed exchange so that SCC may relocate to that site does not warrant consolidating USC's extension request with this proceeding. Although, as we have stated, USC's involvement in this rule making proceeding may provide a basis for extending Station KTSC(TV)'s construction permit, the issue of whether or not USC has satisfied the requirements of Section 73.3534 of the Commission's Rules for obtaining an extension of the permit also involves other questions unrelated to this proceeding. Moreover, as we indicated in the *Notice*, it would not be appropriate for us to decide, in the context of a rule making proceeding to amend the TV Table of Allotments, whether a construction permit that includes a waiver of the minimum spacing rules should be transferred from a noncommercial station to a commercial station. Thus, whether or not USC obtains an extension of the Cheyenne Mountain construction permit, the permit may not be included in the channel exchange and would not affect the public interest analysis of any channel exchange proposal we would approve.

12. Petitioners' application for FCC consent to the assignment of the Cheyenne Mountain construction permit from USC to SCC should also be examined independently of the instant proceeding. We do not agree with petitioners' assertions that the issues involved in deciding whether SCC should receive this permit are identical to the issues that

were involved in granting the permit to USC.²⁶ The Cheyenne Mountain construction permit, including its minimum spacing waiver, was granted to USC largely on the basis of USC's need to provide television service to the area that it is responsible for serving through its educational programs. This factual basis for our grant to USC would not, of course, apply to SCC. Moreover, there is now an application pending for a new station on Channel *8 at Laramie, Wyoming, a circumstance which did not exist when we granted the construction permit to USC. In addition, as we discuss more fully below, it would be contrary to well-established Commission policy to grant a minimum spacing waiver at the allotment stage. We therefore conclude that petitioners' assignment application should be examined on its merits separately from the instant rule making proceeding.

13. USC's applications for new translator stations should also be considered separately from this proceeding. As we indicated in the *Notice*, we may not consider any speculative gains in coverage attributable to translators in our public interest analysis of the channel swap proposal.²⁷ Moreover, we note that, although petitioners state in their joint comments and reply comments in the channel exchange proceeding that USC will use funds contributed by SCC to construct these translators, USC has gone forward with its translator applications independently of this proceeding, certifying to its financial ability to construct and operate the stations and apparently intending to do so whether or not the channel exchange with SCC is approved.²⁸ Thus, there is no factual or legal reason for consolidating the translator applications with this proceeding.

14. In light of the factors discussed above, we will deny petitioners' Joint Motion to Consolidate Proceedings and, in keeping with this decision, we will not consider herein the various arguments presented by the commenters in this proceeding regarding the merits of USC's request to extend the Cheyenne Mountain construction permit. Although we touched briefly on this issue in the *Notice*, we now find that it falls outside the scope of this proceeding.

CHANNEL EXCHANGE PROPOSAL

15. *Comments.* Turning to the channel exchange proposal itself, we first consider petitioners' contention that the Cheyenne Mountain construction permit must be included in the exchange. In their joint comments filed in response to the *Notice*, petitioners assert that our exclusion of the Cheyenne Mountain permit from our channel exchange proposal is unwarranted and contrary to law on a number of grounds.²⁹ Thus, petitioners note that, when the Commission adopted Section 1.420(h) of its rules, it specifically provided that permittees could be parties to channel exchanges, and they argue that it necessarily follows from this that permits for unbuilt modifications must be transferred

²⁵ Joint Reply Comments at 28-29.

²⁶ In their Joint Motion to Consolidate Proceedings, petitioners argue generally that all of the proceedings they wish to have consolidated involve the same issues, without specifically explaining how this might be the case. In their comments in response to the *Notice*, they contend specifically that the issues

that would be involved in considering a grant of the permit to SCC would be those that were involved in considering the grant to USC. See *infra* para 16.

²⁷ *Notice*, 8 FCC Rcd at 4754.

²⁸ See *supra* note 18.

²⁹ Joint Comments at 3-9; Joint Reply Comments at 10-14.

in connection with channel exchanges.³⁰ Petitioners further assert that the Commission has routinely approved channel exchanges involving outstanding construction permits for unbuilt stations, that no previous approvals of channel exchanges involving authorizations for unbuilt facilities have depended on prior implementation of the permits,³¹ and that the transmitter relocation sought by SCC is no different from other such relocations obtained by commercial licensees in channel swaps approved by the Commission.³²

16. Petitioners also argue in their comments that inclusion of the Cheyenne Mountain construction permit is the only "sensible result" here because, if the permit is excluded, the parties to the exchange will have to file an application for consent to assign the permit to SCC, or SCC will have to file a modification application to relocate to Cheyenne Mountain.³³ In either case, petitioners claim, the Commission will be required to address issues it has already considered in granting the permit to USC. According to petitioners, the Commission has already decided that operation of a television station on Channel 8 from Cheyenne Mountain is in the public interest, and the short-spacing waiver granted to USC should not be reevaluated to determine whether SCC may also make use of the waiver.³⁴ Indeed, according to petitioners, the Commission, having made a determination that the waiver for USC was in the public interest, is bound under the doctrine of *res judicata* to grant the same waiver to SCC. Petitioners further argue that Section 73.610 is a technical rule and that, under well-established Commission policy, waivers of technical rules should not be based on nontechnical considerations. To base such a waiver on the commercial or noncommercial status of a station would, they contend, be contrary to the First Amendment, Section 326 of the Communications Act of 1934, as amended, and judicial precedent.³⁵ Based on these arguments, petitioners assert that the fact that the Cheyenne Mountain permit contains a short-spacing waiver is not an impediment to inclusion of the permit in the channel exchange.

17. Finally, petitioners state that SCC's continued interest in the channel exchange at issue here is conditioned upon inclusion of the Cheyenne Mountain construction permit.³⁶

18. In its comments, KKTv states that our decision in the *Notice* not to include the Cheyenne Mountain construction permit in our channel exchange proposal was correct. According to KKTv, the construction permit for Cheyenne Mountain should be extended only for the use of USC or not extended at all, and USC should not be allowed to abandon the commitment it made to provide

primary service to Colorado Springs by now turning over the Cheyenne Mountain construction permit to SCC.³⁷ KKTv argues that the cases cited by petitioners as precedent for inclusion of the Cheyenne Mountain permit are inapposite here, stating in particular that the channel exchange approved in *Gary, Indiana*, did not result in a commercial station acquiring a short-spaced site that had been granted to a noncommercial station.³⁸ KKTv also asserts that the minimum spacing waiver granted to USC was based on unique facts, that entirely different public interest considerations would be involved if SCC were to apply for such a waiver, and that it is therefore absurd to claim, as petitioners do, that no new issues would be raised by a waiver application filed by SCC.³⁹ In addition, KKTv states that petitioners are wrong in claiming that the Commission must consider only technical issues in granting minimum spacing waivers, and in claiming that a grant of the waiver in question here to SCC would be required by the doctrine of *res judicata*. With respect to the latter claim, KKTv argues that the doctrine of *res judicata* would not be applicable to a waiver request by SCC because, *inter alia*, SCC was not a party to the USC waiver request proceeding.⁴⁰ Finally, KKTv argues that the Commission's consideration of the nature of a station's programming as a public interest factor in minimum spacing waiver decisions is not unconstitutional, and asserts that USC, which specifically argued that it should receive its requested waiver because it provides educational programming, should not now complain that the consideration of this factor is unconstitutional.⁴¹

19. Pikes Peak, in its comments, also agrees with our determination in the *Notice* that the Cheyenne Mountain construction permit should not be included in a channel exchange between USC and SCC. According to Pikes Peak, the Commission's grant of the minimum spacing waiver to USC was based on Station KTSC(TV)'s status as a noncommercial educational facility, and the short-spacing rules would be circumvented if SCC were allowed to obtain the permit.⁴² In Pikes Peak's view, the exchange proposal would "destroy the expanded noncommercial coverage" that was the basis for granting USC the Cheyenne Mountain permit, and replace it with "minimally improved coverage from secondary, displaceable facilities."⁴³ In its reply comments, Pikes Peak reiterates its view that the proposed exchange is not in the public interest because the objective of the Commission's channel exchange policy is to improve noncommercial coverage and USC can improve its coverage only by operating at Cheyenne Mountain.⁴⁴ Pikes Peak further asserts that there is nothing in the FCC's exchange policy order or any other

³⁰ Joint Comments at 4-6.

³¹ *Id.* at 6-8.

³² Joint Reply Comments at 11-14. Petitioners cite, *inter alia*, *Gary, Indiana*, MM Docket No. 86-80, 51 Fed. Reg. 30,864 (1986), *petition for recon. dismissed*, 1 FCC Rcd 975 (1986), *Clermont and Cocoa, Florida*, 4 FCC Rcd 8320 (M.M.B. 1989), and *Boca Raton and Lake Worth, Florida*, 8 FCC Rcd 6189 (M.M.B. 1993) -- cases in which the Commission approved channel exchanges involving construction permits for unbuilt facilities -- in support of their assertion that we are bound by precedent to include the Cheyenne Mountain construction permit in the channel exchange at issue here.

³³ Joint Comments at 5-6 n.7. As already noted, petitioners in fact have filed an application for FCC consent to the assignment

of the permit from USC to SCC. This application was filed on September 2, 1993, one day before the deadline for filing comments in the instant proceeding. See *supra* note 17.

³⁴ Joint Comments at 5 n.7.

³⁵ *Id.* at 14-17. However, petitioners cite no case law in support of this contention.

³⁶ Joint Comments at 3 n.3; Joint Reply Comments at 4-5.

³⁷ KKTv Comments at 11-21.b

³⁸ KKTv Reply Comments at 2-5.

³⁹ *Id.* at 5-6.

⁴⁰ *Id.* at 12-15.

⁴¹ *Id.* at 16-17.

⁴² Pikes Peak Comments at 2-3.

⁴³ *Id.* at 9.

⁴⁴ Pikes Peak Reply Comments at 2-3.

authority cited by petitioners that obligates the Commission to include a short-spaced construction permit site in a channel exchange.⁴⁵ In its comments, Pikes Peak concludes that petitioners' channel exchange proposal should be denied but does not oppose the proposal as set forth in the *Notice*. In its reply comments, Pikes Peak requests that the Commission dismiss the *Notice* in its entirety, based on petitioners' statement that they will not pursue the exchange as proposed therein, or grant the exchange only as proposed in the *Notice*.⁴⁶

20. CWC expresses no opinion as to the merits of the channel exchange proposed in the *Notice* but opposes SCC's request that it be authorized to operate from the Cheyenne Mountain construction permit site, which, according to CWC, is short-spaced to both the Laramie reference coordinates and CWC's proposed transmitter site. CWC states that its proposed station would provide the first over-the-air noncommercial television service to a substantial portion of southeastern Wyoming, including the state capital, Cheyenne.⁴⁷

21. *Discussion.* Petitioners are correct in stating that the intraband channel exchange procedures of Section 1.420(h) of the Commission's Rules are available to permittees. However, we do not agree with petitioners' assertion that, merely because a permittee of an unbuilt station could be a party to a channel exchange, it therefore follows that a construction permit for the modification of licensed facilities "must" be transferred in connection with a channel exchange proposal.⁴⁸ Nothing in Section 1.420(h) or the Commission's policies underlying that rule requires the transfer of a construction permit held by a licensee for the modification of its facilities as part of a channel exchange. Moreover, petitioners make far too much of the fact that the Commission recognized when it adopted Section 1.420(h) that intraband channel exchanges could result in benefits for both noncommercial and commercial stations. This recognition does not mean, as petitioners suggest, that the Commission intended in adopting its channel exchange procedures to ensure a benefit for commercial stations.⁴⁹ Indeed, the Commission clearly stated when it adopted

Section 1.420(h) that its primary purpose in doing so was to enable noncommercial educational stations to improve their service.⁵⁰ In upholding the channel exchange policy, the U.S. Court of Appeals for the District of Columbia Circuit also explained that the Commission adopted the policy "as a rescue effort for educational broadcasting in the wake of decreases in federal funding" and repeatedly referred in its opinion to the FCC's goal of promoting educational television by making it easier for educational channels to raise money through channel exchanges.⁵¹ We assume that commercial stations will request channel exchanges with noncommercial stations when it is in their interest to do so, but Commission policy in no way requires that the commercial party to a channel exchange receive any particular benefit in order for the exchange to be in the public interest.⁵²

22. Petitioners' contention that Commission precedent requires inclusion of the Cheyenne Mountain construction permit in the channel exchange proposal under consideration is also wrong. Petitioners cite cases in which the Commission has approved exchanges that benefited commercial stations, suggesting that these cases somehow support the proposition that SCC is entitled to the benefit it seeks through the exchange. However, the case law does not support such a proposition. Moreover, petitioners' claim that the benefit SCC seeks is no different from the benefits obtained by other commercial stations whose channel exchange proposals have been approved is also inaccurate. As petitioners correctly state, the Commission has approved channel exchanges involving construction permits for unbuilt stations, allowing commercial stations to relocate their transmitters to construction permit sites. However, Commission case law does not require us to approve a channel exchange that would result in a commercial station moving to a site at which it would be short-spaced.⁵³

23. Moreover, the grant of a minimum spacing waiver in connection with petitioners' request to amend the TV Table of Allotments would be inconsistent with well-established Commission policy.⁵⁴ The Commission has denied

⁴⁵ *Id.* at 7-8.

⁴⁶ *Id.* at 1-2, 10.

⁴⁷ CWC Comments at 1-2.

⁴⁸ See Joint Comments at 4-5.

⁴⁹ See Joint Reply Comments at 10.

⁵⁰ See *Intraband Television Channel Exchanges*, 59 RR 2d at 1464a.

⁵¹ *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 406, 409, 410 (D.C. Cir. 1991). The Commission's interest in assisting noncommercial educational stations in particular through its channel exchange procedures is reflected in Section 1.420(h) itself, which does not apply to exchanges between two commercial stations, but only to exchanges to which a noncommercial station is a party, and in various aspects of the Commission's order adopting Section 1.420(h). Thus, for example, the Commission explained in adopting the rule that it would apply Section 1.420(h) to permittees in order to help noncommercial permittees build their stations and that it would accord significant weight to determinations made by directors of public stations in assessing the public interest benefits of a proposal. *Intraband Television Channel Exchanges*, 59 RR 2d at 1464a.

⁵² We note that in upholding the Commission's decision to approve a channel exchange in *Clermont and Cocoa, Florida*, 4 FCC Rcd 8320 (M.M.B. 1989), *aff'd*, 5 FCC Rcd 6566 (1990), the Court of Appeals concluded that the FCC properly determined that the exchange served the public interest and further ex-

plained that the money obtained by the noncommercial station "allows an educational channel to operate where it otherwise would not have. Cash infusion is stated in the Policy to be one way to promote the public interest, and the Policy does not require that exchanges promote the public interest in more than one way." *Rainbow Broadcasting*, 949 F.2d at 413.

⁵³ Petitioners assert pointedly that the Commission has approved exchanges that allowed commercial stations to move their transmitters to sites where they would have been prohibited from moving by the Commission's minimum distance separation requirements if they had continued to broadcast on the channel originally assigned to them. Contrary to the conclusion petitioners draw, the approval of such an exchange would in no way support our approval of an exchange resulting in a move to a short-spaced site.

⁵⁴ Petitioners assert that in the *Notice* the Commission excluded the Cheyenne Mountain permit from its channel exchange proposal solely because USC had not implemented the permit, without mentioning the minimum distance separation rules. Joint Reply Comments at 13 n.32. This characterization of the *Notice* is inaccurate. In making its proposal based on the coordinates of USC's and SCC's licensed facilities at Baculite Mesa, the Commission specifically noted that SCC can operate Station KOAA-TV on Channel 8 at USC's licensed site in conformity with the minimum distance separation rules, whereas the allotment of Channel 8 at Cheyenne Mountain would be

the vast majority of requests for short-spaced allotments because it has "a strong interest in preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based."⁵⁵ As the Commission has explained, "[s]trict adherence to the spacing requirements reflected in the Table is necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments]."⁵⁶ In the rare cases in which the Commission has granted short-spaced allotments, it did so based on highly unusual circumstances. Thus, in the *VHF Drop-In Proceeding*, the Commission granted four requests for short-spaced allotments that resulted in service gains of more than 500,000 persons with minimal service interference or loss.⁵⁷ The Commission explained at the time that short-spaced allotments would be permitted only where there was a large public benefit to be gained at minimal cost.⁵⁸ We have continued since then to apply this principle, requiring that the public interest benefits of the short-spaced allotment be large enough to outweigh the public interest benefit of the minimum spacing rules.⁵⁹ In applying this policy, the Commission has also explained: "Absent a demonstration of compelling need for departure from established interstation separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes."⁶⁰

24. In the instant proceeding, petitioners have not made a showing of compelling need to support their request for a short-spaced allotment, nor are we dealing here with an extraordinary situation. This is an ordinary case in which petitioners understandably seek to improve their coverage of certain geographical areas, but the public interest benefits that would be derived from the short-spaced allotment they seek are not large enough to outweigh the public interest benefit of the integrity of the TV Table of Allotments and the minimum spacing rules. As we have already indicated, most of the noncommercial service gains to be derived from the channel exchange proposal would be achieved through translators, which may be displaced by full power stations. Thus, such gains might have to be forfeited at any time, and it would be inappropriate for us to consider them here. Moreover, even if it were appropriate for us to consider Station KTSC(TV)'s projected gains in secondary service in our assessment of the public interest benefits of the proposed channel exchange, USC has already applied for construction permits for translators at Grand Junction and Durango. It appears, therefore, that USC plans to expand its service to the Western Slope of Colorado by means of these translators whether or not the proposed channel exchange is approved, and the exchange is not needed to accomplish this expansion. If the exchange

were approved, only 5,398 persons would gain a new noncommercial service that is not attributable to translators.

25. Opponents of petitioners' proposed channel exchange also argue that the exchange would not be in the public interest for other reasons. According to KKTV, for example, 29,367 people would lose their only off-air primary commercial service as a result of the exchange if SCC were permitted to operate Station KOAA-TV from Cheyenne Mountain, while only 2,906 viewers would receive their first off-air primary noncommercial service from Station KTSC(TV). Arguing that any loss of service is *prima facie* inconsistent with the public interest, KKTV contends that the large losses involved here are contrary to the public interest.⁶¹ KKTV also states that any improvements in noncommercial service as a result of the translator service proposed by petitioners would be marginal, in part because many of the people the translators would reach already receive educational television through cable.⁶² Petitioners, on the other hand, assert that any loss of commercial service caused by their proposed exchange would be *de minimis* and would be outweighed by the noncommercial service gains to be realized.⁶³

26. We find that it is unnecessary to resolve all of the various points in dispute between petitioners and other commenters as to how the potential losses and gains in service should be evaluated in this case. It is apparent that USC has decided to go forward with its translator expansion on the Western Slope independently of the proposed channel exchange. Moreover, even if we were to consider as part of our public interest analysis the translator stations petitioners claim USC would build or acquire as a result of their proposed exchange -- i.e., stations at Colorado Springs, Durango, and Grand Junction --, we would be forced to recognize that these stations could provide only secondary service. In light of this fact, and given the very small number of people that would gain a new noncommercial service that is not attributable to translators, we conclude that the public benefits to be gained by including the Cheyenne Mountain construction permit in the proposed channel exchange fall far short of the large benefits the Commission has required in order to grant a short-spaced allotment.

27. Petitioners have stated that SCC's continued interest in the proposed channel exchange is conditioned upon inclusion of the Cheyenne Mountain construction permit in the exchange proposal ultimately approved by the Commission. As explained above, however, we find that inclusion of the Cheyenne Mountain construction permit would not be in the public interest. Accordingly, the channel

short-spaced, and the Commission further stated that it was not appropriate to consider a short-spacing request at the rule making stage. Notice, 8 FCC Rcd at 4753.

⁵⁵ *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572, 5572 (1990).

⁵⁶ *Id.* (citing *Millington, Maryland*, 45 RR 2d 1689, 1690-91 (1979)).

⁵⁷ *Petition for Rulemaking to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure That the New Stations Maximize Diversity of Ownership, Control and Programming, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 63 F.C.C.2d 840 (1977), *Report and Order*, 81 F.C.C.2d 233, 261-67 (1980), *recon. denied*, 90 F.C.C.2d 160 (1982).

⁵⁸ 63 F.C.C.2d at 855.

⁵⁹ See, e.g., *London, Kentucky*, 7 FCC Rcd 5936, 5937 (M.M.B. 1992).

⁶⁰ *Id.* See also *Portland, Tennessee*, 35 F.C.C.2d 601, 602 (1972) (explaining that minimum spacing waiver at rule making stage could only be considered in an "extraordinary situation"); *Toms River, New Jersey*, 43 F.C.C.2d 414, 417-18 (1973) (finding that absent "special justification," there is no public interest basis for proposing short-spaced allotment).

⁶¹ KKTV Reply Comments at 18-19.

⁶² KKTV Comments at 8-10.

⁶³ Joint Reply Comments at 14-20.

exchange proposal presented in the *Notice* will not be modified to include this permit. In light of petitioners' lack of interest in pursuing the proposal as set forth in the *Notice*, there is no need to consider further whether this proposal would be in the public interest.

28. Accordingly, IT IS ORDERED, That the Joint Motion to Consolidate Proceedings filed by the University of Southern Colorado and Sangre De Cristo Communications, Inc., IS DENIED.

29. IT IS FURTHER ORDERED, That the petition for rule making to exchange channels filed by the University of Southern Colorado and Sangre De Cristo Communications, Inc., IS DENIED.

30. For further information concerning this proceeding, contact Diane Conley, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

EXHIBIT 2

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of THE PIKES PEAK BROADCASTING COMPANY, licensee of KRDO-TV, Colorado Springs, Colorado, in support of its comments on the MSTV Alternate Channel Allotment Plan.

Based on the spacing criteria contained in Section 73.623(d) of the Commission's Rules, it has been determined that Digital Television Channel 46 may be allotted to KTSC, Pueblo, Colorado, for use at its licensed transmittal site.

I declare that the foregoing statements are true and correct to the best of my knowledge and belief.

A handwritten signature in black ink, consisting of a stylized 'N' followed by a horizontal line that ends in a small hook.

NEIL M. SMITH

December 17, 1997

CERTIFICATE OF SERVICE

I, Monica Moore, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 17th day of December 1997, a copy of the foregoing *Comments on MSTV Alternate Channel Allotment Plan* was sent via first-class mail, postage pre-paid, to the following:

Mr. William Kennard *
Chairman
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Mr. Harrold W. Furchgott-Roth*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Mr. Michael Powell*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

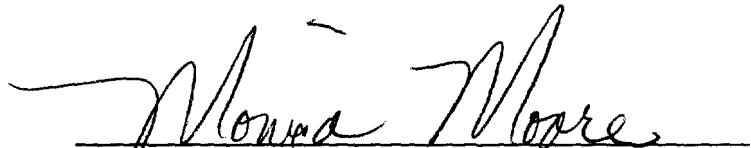
Ms. Susan Ness*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Ms. Gloria Tristani*
Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Mr. Jonathan D. Blake
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044-7566

Malcolm G. Stevenson, Esquire
Schwartz, Woods & Miller
1350 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036
(Counsel for University of
Southern Colorado)

Kevin F. Reed, Esquire
Timothy J. O'Rourke, Esquire
Scott D. Dailard, Esquire
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(Counsel for Sangre de
Cristo Communications, Inc.)


Monica Moore